NO. 97205-2

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF

ENDY DOMINGO CORNELIO,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. INTRODUCTION

Rapid developments in the area of juvenile offender sentencing have encouraged appeals in which offenders attempt to characterize themselves as within the class requiring resentencing. The courts would benefit from an opinion clarifying the class of offenders affected *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

Houston-Sconiers is limited in its holding by the Eighth Amendment precedent from which it draws its authority. For a defendant to be resentenced under *Miller v. Alabama* and its progeny, the offense must have been committed before the offender reached the age of 18. And the sentencing scheme must pose a risk of a term of incarceration that does not provide a meaningful opportunity for release in the offender's lifetime, i.e. a risk of a *de facto* life sentence.

The Petitioner Endy Domingo Cornelio was never at risk of a life sentence. His determinate range was 20-26 years. In addition, the sentencing scheme offered the court discretion to depart from the range to impose as little as zero days. Cornelio did not ask the court to depart from the range, but he did receive a low-end sentence and may be eligible for release in his mid-30's. Cornelio is not a member of the *Houston-Sconiers/Miller* class.

II. RESTATEMENT OF THE ISSUES

A. Where the significant change instituted by *Houston-Sconiers* regards mandatory terms of incarceration, and where Cornelio's sentence was not subject to any mandatory terms of incarceration such that the court could have imposed as little as zero days, did the court of appeals properly find that the change was not material to Cornelio's sentence?

B. Is Cornelio a member of the *Houston-Sconiers/Miller* class where he was not sentenced under a scheme that could have denied him a meaningful opportunity for release in his lifetime?

III. STATEMENT OF THE CASE

The Defendant Cornelio has been convicted by a jury of multiple counts of child rape and child molestation occurring over a two year span. CP 1-4, 44-56. His victim A.C. was between the ages of four and six during the abuse, when the Defendant would have been between the ages of 14 and 16. CP 1-4, 44. When A.C. disclosed, the Defendant was an adult. *Id.* He was 22 years old when he was sentenced. *Id.*

Because the Defendant was under the age of 18 at the time of the crimes, he received a determinate sentence. RCW 9.94A.507(2); CP 48. The prosecutor recommended the high end of the 20-26 year standard range. RP 729-30. Defense counsel requested the low end, making repeated references to his client's age. RP 731-32. The court considered the defense argument regarding youth and imposed the sentence Cornelio requested: a 20 year sentence and 36 months of community custody. CP 48-49; RP 733.

This personal restraint petition was filed within a year of the date of finality. Personal Restraint Petition (PRP) at 17. Cornelio argued that his petition was timely. PRP at 16. The State did not disagree. State's Response to Personal Restraint Petition.

Four of the five grounds raised in the petition alleged ineffective assistance of counsel. PRP at i-ii. The fifth ground requested resentencing under *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015) and *Matter of Light-Roth*, 200 Wn. App. 149, 401 P.3d 459 (2017), *rev'd*, 191 Wn.2d 328, 422 P.3d 444 (2018). PRP at ii, 43-49.

Regarding this last claim, the court of appeals noted that "after both parties filed their briefs, our Supreme Court held that *O'Dell* did not constitute a 'significant change in the law." Unpublished Opinion at 33.

Although not clearly raised as a ground for relief in the petition, the court of appeals also considered the decision in *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). Unpub. Op. at 33-34. Because the fifth ground was framed as a significant change in sentencing law, the court of appeals referred to the relevant subsection of the court rule.

> As Cornelio's petition is timely, it need not meet the retroactivity criteria of RCW 10.73.100(6). Rather, it must meet the retroactivity standard of RAP 16.4(c)(4).

Unpub. Op. at 33 n.21. The court of appeals found that *Houston-Sconiers* did not overturn a prior appellate decision "that was determinative of a material issue" in Cornelio's case. Unpub. Op. at 34.

This Court has accepted review "only on the issue of the applicability" of *Houston-Sconiers* "and, if the case is applicable, the effect of that case."

IV. ARGUMENT

A. The significant change in *Houston-Sconiers* is not material to Cornelio's sentencing so as to establish unlawful restraint under RAP 16.4(c)(4).

State courts are well advised to decide challenges on independent and adequate state grounds in order to pre-empt federal intervention. *Lambrix v. Singletary*, 520 U.S. 518, 523, 117 S. Ct. 1517, 1522, 137 L. Ed. 2d 771 (1997). The court rule requires that an allegation of unlawful restraint satisfy RAP 16.4(c). The federal courts will only respect state procedural bars when state courts regularly apply those bars and clearly announce when the procedural bar is a basis for a ruling. *Ford v. Georgia*, 498 U.S. 411, 111 S. Ct. 850, 857-58, 112 L. Ed. 2d 935 (1991); *Powell v. Lambert*, 357 F.3d 871 (9th Cir. 2004). Therefore, before a court reaches the merits, in order to maintain its authority over its own cases, the court should first determine whether the petition satisfies the court rule.

The court rule finds unlawful restraint where:

> There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard;

RAP 16.4(c)(4). This is not unlike the standard in RCW 10.73.100(6), which requires a petitioner to establish that the new case:

1. is a significant change in law
2. that is material
3. and that applies retroactively.

In re Yung-Cheng Tsai, 183 Wn.2d 91, 351 P.3d 138 (2015).

Previously this Court had held that trial courts lack discretion to run firearm sentencing enhancements concurrently, even as an exceptional sentence. *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608 (1999) (interpreting the absolute language in former RCW 9.94A.310(4)(e), recodified as RCW 9.94A.533(3)(e)). Because the Eighth Amendment trumps legislation, *Brown* is no longer dispositive of sentences involving juvenile offenders. *Houston-Sconiers*, 188 Wn.2d at 21, n.5. A sentencing court may now depart from mandatory firearm enhancements which would otherwise deny a juvenile offender a meaningful opportunity for release in their lifetime. That is a significant change in law. *Matter of Meippen*, 193

Wn.2d 310, 322, 440 P.3d 978, 985 (2019) (Wiggins, J., dissenting) (quoting *In re Greening*, 141 Wn.2d 687, 697, 9 P.3d 206 (2000)).

However, it has no bearing in this case. Cornelio was not subject to a firearm enhancement.

Recently, this Court has interpreted the holding more broadly, stating that *Houston-Sconiers* questioned "*any* statute that acts to limit consideration of the mitigating factors of youth during sentencing." *State v. Gilbert*, 193 Wn.2d 169, 175, 438 P.3d 133, 136 (2019) (emphasis in the original). Under this broader holding, *Houston-Sconiers* is still not material to Cornelio's sentence. Cornelio was not subject to any mandatory provision affecting the length of his incarceration. No statute prevented the court from considering Cornelio's youthful characteristics and departing from the standard range so as to impose a sentence of as little as zero days. *Matter of Light-Roth*, 191 Wn.2d 328, 336, 422 P.3d 444 (2018) ("RCW 9.94A.535(1)(e) has always provided the opportunity to raise youth for the purpose of requesting an exceptional sentence downward").

Some might argue that *Houston-Sconiers* created new obligations on judges to engage in an investigation on behalf of the offender. It did not. The courts cannot consider a mitigating sentencing factor in the absence of a record. A trial court's independent investigation on behalf of a party would violate the codes of judicial conduct regarding impartiality. And the

sentencing court's direction to defense counsel how best to act in the interests of the client would interfere in the attorney-client relationship. This is not a reasonable interpretation of *Houston-Sconiers*. This Court has summarized the holding in *Houston-Sconiers* this way: the Legislature cannot limit the courts' discretion to consider the mitigating factors of youth during sentencing. *Gilbert*, 193 Wn.2d at 175.

Insofar as *Houston-Sconiers* represented a change in the law, the change was not material to Cornelio. The court of appeals did not err in this finding.

B. Where the sentencing scheme provided for a standard, determinate range of 20-26 years and resulted in a meaningful opportunity for Cornelio's release in his 30's, and where the court had discretion to depart downwards still further, Cornelio is not a member of the *Houston-Sconiers/Miller* class.

Cornelio would argue that a *Miller* hearing is required for every juvenile offender sentenced in adult court. This is not the holding of *Houston-Sconiers*, which is an Eighth Amendment case. *Houston-Sconiers*, 188 Wn.2d at 18-20, 23 (calling the decision "Our Eighth Amendment holding") and at 21, n.6 (declining to address an article 1, ¶ 14 claim raised for the first time in supplemental briefing). *See also Meippen*, 193 Wn.2d at 324 (Wiggins, J., dissenting) ("The entire case was premised on the dictates of the Eighth Amendment."); *State v. Bacon*, 190 Wn.2d 458, 467,

415 P.3d 207, 212 (2018) ("our holding in *Houston-Sconiers* was based squarely on the United States Constitution").

The Eighth Amendment is concerned with "excessive sanctions" and is only implicated when a sentencing scheme would deny youthful offenders a "meaningful opportunity" for release by "sentencing them to a lifetime in prison." *Miller v. Alabama*, 567 U.S. 460, 469, 479-80, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (citing *Graham v. Florida*, 560 U.S. 48, 75, 130 S. Ct. 2011, 2030, 176 L. Ed. 2d 825 (2010) and *Roper v. Simmons*, 543 U.S. 551, 560, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)). The significance of *Miller* was not that children are different. We have long treated children differently as demonstrated by the existence of juvenile courts, competency rules, and many, many laws. *Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 974-75, 977 P.2d 554, 561 (1999) (these age distinctions are based on society's judgments about maturity and responsibility). The significance of *Miller* is that, because children are different with a unique capacity for rehabilitation and change, courts must have the discretion to consider this when faced with a sentencing scheme that otherwise would not permit a meaningful opportunity for these offenders to be released in their lifetime subsequent to their rehabilitation. *Miller*, 567 U.S. at 477-78.

Less than two months before the issuance of *Houston-Sconiers*, this Court held that *Miller* applies to life-without-parole and *de facto* life sentences equally. *State v. Ramos*, 187 Wn.2d 420, 437, 387 P.3d 650 (2017). *Miller* "applies to any juvenile homicide offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation." *Id.* at 438.

Houston-Sconiers and his co-defendant Roberts were facing sentences in excess of 40 years. *Houston-Sconiers*, 188 Wn.2d at 8. Such significant sentences can be considered *de facto* life sentences. *People v. Buffer*, -- NE.3d --, 2019 IL 122327 at ¶ 41, 2019 WL 1721435 at *7 (Ill. filed Apr. 18, 2019) (subject to revision or withdrawal) (holding that a sentence of 40 years or less does not constitute a *de facto* life sentence in violation of the Eighth Amendment). The reason for the long term was not the standard sentencing range. The court had discretion to depart from the standard range. *Houston-Sconiers*, 188 Wn.2d at 13 (imposing zero months for the base sentences). The concern was the mandatory firearm enhancements. *Id.*, at 12-13. The trial court had no discretion to depart from the enhancements or to run them concurrently, even in an exceptional sentence. *Brown*, 139 Wn.2d at 29.

Houston-Sconiers questioned a statute which would limit the court's ability to consider the mitigating factors of youth during sentencing.

Gilbert, 193 Wn.2d at 175. The Eighth Amendment is not implicated simply because a sentencing scheme has a mandatory component. Driving offenses, for example, have mandatory minimum terms. RCW 46.20.342; RCW 46.61.5055. But a jail term of one to 180 days cannot be said to deny a youth a meaningful opportunity for release in their lifetime. *See also* RCW 9.94A.540 (mandatory minimum terms of five years for first degree assault and rape and SVP escape). It was "the length of the sentence" which triggered the Eighth Amendment review in *Houston-Sconiers*. *Bacon*, 190 Wn.2d at 467 (finding no *Houston-Sconiers/Miller* application to a 65-week manifest injustice disposition).

The rule that comes from *Houston-Sconiers* is that a mandatory sentencing scheme cannot deny juvenile offenders a meaningful opportunity for release in their lifetimes. The *Houston-Sconiers* class then is limited to (1) persons who were under 18 at the time of their offenses and who are sentenced as adults (2) under a mandatory sentencing scheme (3) that would deny them a meaningful opportunity for release in their lifetimes. *Cf. Buffer*, 2019 IL 122327 at ¶27, 2019 WL 1721435 at *5 (holding that "to prevail on a claim based on *Miller* and its progeny, a defendant sentenced for an offense committed while a juvenile must show that (1) the defendant was subject to a life sentence, mandatory or discretionary, natural

or *de facto*, and (2) the sentencing court failed to consider youth and its attendant characteristics in imposing the sentence").

The length of the sentence and a lack of sentencing discretion are necessary factors material to class membership.

Cornelio is a juvenile offender. He was not, however, subject to a mandatory sentencing scheme that would deny him a meaningful opportunity for release in his lifetime. The court was free to depart from the standard range so as to impose a sentence of as little as zero days. *Light-Roth*, 191 Wn.2d at 336.

Nor was he was facing a possible *de facto* life sentence. Cornelio's sentence of 20 years for four class A felonies of child sexual abuse means that he may begin serving his 36-month community custody term when he is in his 30's.

Cornelio is not a member of the *Miller* or *Houston-Sconiers* class.

V. CONCLUSION

The Eighth Amendment does not require a resentencing hearing where Cornelio was not deprived a meaningful opportunity for release in his lifetime. This Court should dismiss the petition as frivolous.

RESPECTFULLY SUBMITTED this 6th day of December, 2019.

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Certificate of Service:
The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

12/6/19 Johnson
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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